No. 12510

IN THE

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

CIA. LUZ STEARICA, a Corporation
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT UNITED STATES OF AMERICA

J. CHARLES DENNIS,
United States Attorney.

BOGLE, BOGLE & GATES,
CLAUDE E. WAKEFIELD,
M. BAYARD CRUTCHER
(Of Counsel)

Proctors for Appellant.

603 Central Building,
Seattle 4, Washington.

FRAYN PRINTING COMPANY

No. 12510

IN THE

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

CIA. LUZ STEARICA, a Corporation
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT UNITED STATES OF AMERICA

J. CHARLES DENNIS,
United States Attorney.

BOGLE, BOGLE & GATES,
CLAUDE E. WAKEFIELD,
M. BAYARD CRUTCHER
(Of Counsel)

Proctors for Appellant.

603 Central Building,
Seattle 4, Washington.

INDEX

CITATIONS

CASES:

STATUTES

TEXTS

No. 12510

IN THE

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

CIA. LUZ STEARICA, a Corporation
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT UNITED STATES OF AMERICA

I.

STATEMENT OF JURISDICTION

This is a case of alleged sea water damage to cargo—sacks of flour.

The consignee, as owner of the goods, brought this action in admiralty against the United States, as owner and operator of the carrier vessel. Its libel was filed in the United States District Court for the Western District of Washington, Northern Division, less than two years after the goods were

delivered. The libelant alleged that if the vessel were privately owned or operated a proceeding in admiralty could be maintained against the ship, in rem, and against her owner, in personam. (Aps. 2) Facts essential to jurisdiction of the United States District Court under the Suits in Admiralty Act (46 USC, §742 et seq.) were admitted in the answer. (Aps. 6)

The court's decree awarded the consignee damages against the United States in the sum of $6,774.42, together with interest and costs. (Aps. 32) The United States appeals from that decree by petition for appeal, duly granted (Aps. 33, 34), as required by this court (Admiralty Rule 33), and by notice of appeal (Aps. 36), as required by statute (28 U.S.C., §2107). This court has jurisdiction thereof. (28 U.S.C., §1291).

II.

STATEMENT OF THE CASE

This action deals with a shipment of 10,500 bags of flour carried from New York to Rio de Janiero aboard the motorship "SWEEPSTAKES" in February, 1946. The consignee, Cia Luz Stearica, claims that 3,087 of these bags were badly wetted with seawater when received by rail at its warehouse in Brazil. It seeks to hold the United States liable therefore, as owner and operator of the ship. The

United States denies that the flour was wet at all when discharged.

The questions involved in the trial of the case and presented by this appeal are:

A. WHETHER THE FLOUR WAS WET WHEN IT WAS DISCHARGED FROM THE "SWEEPSTAKES" AT RIO de JANEIRO.

This issue was raised in the pleadings (Libel, par. VIII, Aps. 4; Answer, par. V, Aps. 7), and evidence offered thereon by the parties, as will be discussed hereafter. The District Court found that the flour was wet from seawater when discharged, by reason of some cause unknown and resulting from unspecified negligence on the part of the appellant, as carrier. (Findings of Fact VI, VII, Aps. 27, 28)

We contend that the evidence does not support such findings.

B. WHETHER EXPERIENCE OF THE VESSEL ON THE PRECEDING AND SUCCEEDING VOYAGES IS RELEVANT TO THE ABOVE ISSUE.

This issue was raised upon offers of evidence by appellant, objected to by appellee. Details are summarized in assignment of error 10. (Aps. 38) We contend that in the circumstances the district court improperly excluded this proof.

C. WHETHER THE VESSEL'S AGENTS WERE GIVEN NOTICE OF A SURVEY OF THE ALLEGED DAMAGE.

This issue was raised by conflicting contentions

of counsel. In response to appellant's interrogatory on this point (No. 9, Aps. 12), appellee submitted as purported notice of survey a letter (par. VII, Aps. 17; Exhibit, Aps. 19; translation, Aps. 64). The Court deemed that this afforded appellant as good an opportunity to make an analysis as the appellee (opinion, Aps. 356), and held that this was in effect a notice of survey (Finding of Fact X, Aps. 29). We contend that it was not.

D. WHETHER (assuming the flour was wet on discharge) THE FLOUR WAS DAMAGED BY WETTING TO THE EXTENT OF 35% OF ITS SOUND MARKET VALUE AT DESTINATION.

This issue was raised by conflicting evidence as to the actual damage suffered, as will be discussed hereafter. The Court found that the flour was damaged to this extent. (Findings of Fact VIII, IX, Aps. 28). We contend that the evidence was insufficient to support the finding.

E. WHETHER THE PROFERRED EVIDENCE OF MARKET VALUE OF THE FLOUR AT DESTINATION WAS COMPETENT OR ADMISSIBLE.

This issue was raised by appellee's offer of certain testimony as to price, objected to by appellant because it was stated to be recollection and belief, and because the witness failed to furnish a copy of the record or published price list, as requested by cross-interrogatory. (Aps. 121, 126 et seq.). The court overruled the objection for reasons stated at

Aps. 133, 134. Its opinion allowed recovery in full at the figure given in this testimony (Aps. 357), but appellee voluntarily submitted a finding based upon the smaller figure stated in answer to interrogatories (Finding of Fact IX, Aps. 28).

Appellant contends that damages in any event should be calculated upon the basis of landed cost, as the only competent evidence of value (answer to Interrogatory 22, Aps. 122; Aps. 132).

III.

ASSIGNMENTS OF ERROR RELIED UPON

Appellant relies upon each of the errors assigned at time of appeal (Aps. 37 et seq.), and adopted in its statement of points on appeal (Aps. 363, par. 1).

These may be conveniently grouped under the questions above stated, as follows:

A. **WHETHER FLOUR WAS WET WHEN DISCHARGED OR SHIP NEGLIGENT. Assignments 1, 2, 3, 4 (Aps. 37), 11 (a), (b), (e) (Aps. 40) and 12 (Aps. 41).**

B. **WHETHER PRIOR AND SUBSEQUENT EXPERIENCE OF VESSEL WAS RELEVANT. Assignment 10 (Aps. 38).**

C. **WHETHER THERE WAS NOTICE OF SURVEY. Assignment 9 (Aps. 38).**

D. **WHETHER IT WAS DAMAGED TO EXTENT CLAIMED. Assignments 5 (Aps. 37), 6, 8 (Aps. 38), 11(c), (d), (e) (Aps. 40), 12 (Aps. 41).**

E. **WHETHER THERE WAS COMPETENT EVIDENCE OF MARKET VALUE. Assignments 7, 8 (Aps. 38(1), 11(d) (Aps. 40), 12 (Aps. 41).**

IV.

APPELLANT'S ARGUMENT

A.

WAS THE FLOUR WET FROM SEAWATER WHEN DISCHARGED FROM THE SHIP? WAS THE SHIP NEGLIGENT WITH RESPECT THERETO?

The errors assigned are:

"1. That the Court erred in finding that the libelant's shipment of flour was delivered by respondent to libelant at Rio de Janeiro in a damaged condition (Findings of Fact 6, 7 and 8) (Aps. 37)

"2. That the Court erred in finding that said shipment of flour was damaged by sea water at the time of discharge from the vessel and when delivered to libelant. (Aps. 37)

"3. That the Court erred in finding that any damage to said flour by sea water or damage from any other cause was proximately caused by respondent's negligence or improper care of said cargo, or was caused by respondent at all. (Findings of Fact 7 and 8). (Aps. 37)

"4. That the Court erred in finding that there was a competent or sufficient chemical analysis of said damaged flour as a basis for a determination of salt water contamination. (Findings of Fact 8.) (Aps. 37).

"11. That the Court erred in making and entering Conclusions of Law 1 and 2 in that there was no proof or sufficient proof—

"(a) That respondent was responsible or liable for any damage;

"(b) That respondent was negligent in any respect;

"(e) That the evidence was insufficient to establish respondent's liability at all and was

insufficient to establish any basis of damage as to the extent thereof or the value thereof. (Aps. 40).

"12. That the Court erred in entering a Final Decree on November 14, 1949, in favor of libelant in the sum of $6,774.42 plus interest and costs, or in any other sum, in that under the evidence before the Court and the evidence improperly excluded by the Court, libelant failed to prove its case and Decree should have been entered in favor of respondent dismissing the libel and awarding respondent its costs." (Aps. 41).

We would first point out that upon the issue whether the flour was wet when discharged appellee had the burden of proof. The libel alleged it was wet when delivered. (Aps. 4). The answer denied the allegation. (Aps. 7). This is not the *Folmina,* 212 U.S. 354, 53 L. ed. 546, 29 S.Ct. 363, where the goods were known to be wet on discharge.

It is the duty of the complaining party to prove its case by a fair preponderance of the evidence, and this is a factor in considering the scope of the review. *The Cleary Bros. No.* 61 (CA, 3), 61 F. (2d) 393, 395.

Second, this is an appropriate case for appellate review of the evidence. All of the essential evidence is in depositions and exhibits—the stowage data and log; the testimony of those present at the discharge, Parsons, Lane, Caswell and Luiz; the content of the records on discharge; the testimony of

those who later saw the flour at appellee's mill, Ferreira, Ramos, Barreto. Under the rule of *The Ernest H. Meyer* (CA, 9), 84 F.(2d) 496, cert. den. 299 U.S. 600, the usual presumption in support of the lower court's findings "is of lesser weight and more easily may be rebutted." (501) Evidence is not weighed to determine whether a *part* of the evidence warrants an inference supporting the finding. The Court "must weigh *the whole evidence.*" (500)

To the same effect, among other cases, is *The Diamond Cement* (CA, 9), 95 F.(2d) 738, 740.

Third, a basic consideration for giving weight to lower court findings is missing. There is no conflict in the evidence upon the important facts. *Reiss S. S. Co. v. Great Lakes Towing Co.* (CA, 8), 177 F. (2d) 681, 682, 683; *Portland Tug & Barge Co. v. Upper Columbia R. Tow. Co.* (CA, 9), 153 F. (2d) 237, cert. den., 328 U.S. 863.

Fourth, the theory adopted by the trial court is improbable. It runs counter to common experience in sea commerce. It supposes that a large number of big flour sacks were wet with sea water as they passed through the hands of longshoremen, past the eyes of tallymen and customs men and ship's officers, without any of them seeing or feeling the wetness, without any other consignee's flour getting wet, or any other cargo getting wet, or any trace

of water being left on the dunnage or dunnage paper, or showing in the ship's bilges.

This is another consideration affecting the scope of review. As Judge Learned Hand remarked for the court in *Bellhaven* (CA, 2), 72 F.(2d) 206, 207:

> "We are indeed not ordinarily given to reversing the district court upon an issue of fact, though of course we have an eventual responsibility for the facts as well as for the law. But there are a number of considerations which take this case out of the ordinary rule. The judge did not see any of the *Bellhaven's* witnesses except the pilot; and he was not so much impressed as we cannot help being by the absurdity of their story on its face. * * *"

The goods in question, 10,500 bags of wheat flour, of 50 kilograms (110 pounds) each, were loaded aboard the Appellant's motorship "SWEEPSTAKES" at New York City, at the end of January, 1946, for carriage to Rio de Janeiro, Brazil, and delivery to Appellee.

(1) CHARACTER OF VESSEL

The "SWEEPSTAKES" is a Wilmington-type C-2, a modern fully-welded cargo vessel of five holds, with forced-draft ventilation from the top of the king posts, and steel pontoon hatch covers on the weather decks. (Aps. 139, 194, 144)

(2) LOADING AT NEW YORK

At time of loading three tiers of criss-crossed dunnage were laid on the floor of each hold where

this flour was stowed, bottom tiers being laid fore and aft to allow drainage of water into the scuppers. Heavy dunnage paper was laid over this, and over other exposed wood and metal, to protect the sacks. (Aps. 151, 152, 192, 193, 206, 209) Cargo battens covered all longitudinals and stringers. (Aps. 153) The flour consigned to Rio de Janeiro was stowed in Nos. 1, 2, 3 and 4 'tween decks, and No. 4 lower 'tween deck—top stowage, so-called, for quick discharge as priority cargo. (Aps. 50, 154) It included appellee's shipment and 2,315 sacks consigned to others. (Libelant's Exhibit 2)

There was no rain during loading. (Aps. 155, 156, 193)

The hatch tallies show that 1,965 bags of consignee's flour were loaded on January 28. The balance was loaded on or after January 31, when Chief Officer Parsons joined the vessel. (Aps. 51)

The Chief says that at that time he inspected the cargo gear and hatches, went down in all the hatches, and

> "as far as I can recall everything appeared in order, ample dunnage was laid and the cargo seemed to be coming aboard in good condition and being properly stowed at the time. (Aps. 51, 52)
>
> "Q. (by Mr. Lord). Did you find any moisture or dampness or water in the hatches at that time?
>
> A. No, there was no indication of that." (Aps. 52)

The Chief examined each hold personally. (Aps. 206, 207) At the conclusion of loading, the vessel's weather hatches were battened down. Three new tarpaulins, each inspected and found without tears or defects, were laid properly over each hatch cover, and fastened with strongbacks. (Aps. 147, 159, 194) Ventilation blowers were put in operation. (Aps. 159)

(3) THE VOYAGE

Captain Lane, master of the SWEEPSTAKES, was asked to characterize the voyage between New York and Rio de Janeiro. He replied:

> "A typical South American voyage such as I have experienced for the last eight years: quiet, moderate breeze, moderate seas." (Aps. 157)

The log book for the voyage was in the hands of counsel and the witness during the taking of this deposition, and was briefly reviewed. (Aps. 159 et seq.) It is an exhibit. Nothing which would contradict this generalization appears.

The ship was light-loaded, about two feet above her marks. (Aps. 180)

The first port of call was Trinidad, where the vessel arrived on February 9. (Aps. 159) It discharged mail from No. 5 hatch (Aps. 160, 194), took bunkers, and departed on the same day. (Aps. 159, 160)

The "SWEEPSTAKES" arrived at Rio de Janeiro, its next port of call, on February 19. (Aps. 160) On the following day, it docked at a deepwater berth. (Aps. 162)

(4) DISCHARGE AT RIO

Discharge of cargo commenced on February 21. (Aps. 160, 161) The flour to consignee and others was discharged under mixed marks. (Aps. 217) The flour was loaded onto open flat cars (Aps. 162, 55), at which time it was tallied by customs men (Aps. 162, 221), Moore - McCormack tally clerks (Aps. 221) and dock tally clerks. (Aps. 221) A ship's officer was on deck at all times. (Aps. 208)

There were occasional rains during unloading, but during these periods discharge ceased and hatches were covered. This is general practice, and is required by customs. (Aps. 161, 197, 198, 225)

Discharge of all cargo was completed on the morning of the 25th (Aps. 161, 198), although it appears that unloading of this flour—priority cargo—was completed on the 23rd. (Aps. 217)

The cars were provided by the docks administration on behalf of consignee. (Aps. 219)

(5) CUSTOMS REQUIREMENTS

At this point it will be helpful to the court if we deviate from the chronological summary, and mention the pertinent Brazilian laws and regula-

tions bearing on notation of damage.

The evidence is that of a lawyer, Dr. Braz de Camargo, in practice in Rio de Janeiro and familiar with the laws and regulations of Brazil related to customs. (Aps. 323 et seq.) Appellee offered no proof to contradict it.

(a) Decree n. 355 A of 25th April, 1890, Art. 11, provides as follows:

> "Article 379. The longshoreman foreman, his assistants, warehouse keepers, and guards attending discharge and in charge of organizing records are responsible for pointing out all packages turning up damaged, broken, renailed, or in any way damaged, this circumstance also to be noted on discharge sheets, the necessary declarations being noted down on the same day as packages are discharged." (Aps. 324)

This law is superior to regulations of the respective port administrations, which cannot conflict with it. (Aps. 326) This law was in force in February, 1946. (Aps. 325)

(b) De Camargo testifies, based upon the customs law and regulations and his professional experience, that

> "The Brazilian customs house officials are required to inspect all cargo discharged and make notation of any damage. The consignees generally insist on such notations since it is on said notations that the custom house duties are assessed." (Aps. 327)

This is substantiated by his actual knowledge. (Aps. 329)

Specifically, as to flour discharged at Rio in February, 1946, damaged by salt water, and stained and caked, de Camargo says:

> "In my opinion, this condition would have been noted by customs house officials and even if his attention had not been drawn to such bags in the condition as described in Question No. 12, the representative of the consignee at the time of discharge would probably have called the attention of the official to it. It is doubtful that the official would not have noted the condition of the bags to avoid future doubts with reference to the duties." (Aps. 328)

(c) There is no deviation from this practice or requirement where priority cargo by-passes the customs warehouse. (Aps. 329) Inspection is made at dock side. (Aps. 329)

> "If this was not done for certain cargoes, for which permission by special arrangement has been obtained, the officials would not be able to check that the duties have been properly paid." (Aps. 330)

An added incentive is that customs officials receive a percentage of the fines imposed on those who do not declare exactly the nature of the cargo.

> "* * * It would be in the interest of the official to check any cargo, and, if shortlanded, fine the captain of the ship." (Aps. 330)

At this point, the following testimony of Captain Lane takes on added significance:

"Q. (by Mr. Lord). Were those bags discharged on to a pier or on to lighters?

A. No, being a priority cargo it was passed through customs and loaded on flat cars. CUSTOMS TALLIED THE CARGO AS IT WENT INTO THE OPEN FLAT CARS. THAT I OBSERVED MYSELF." (Aps. 162)

This casual remark, not in the context of the questioning then being made, bears the stamp of honest recollection and truth.

(6) THE RECORD OF DISCHARGE

Four witnesses saw portions of this cargo as it was discharged.

(a) *Chief Officer Parsons* made the most frequent inspections. His testimony is that he was on duty when the hatches were opened up, and that he "sighted the hatches, looked at the general condition of the cargo." (Aps. 195) His purpose was to see if there was any sweat damage. "It was a rather smooth voyage, there was no heavy weather damage or anything like that, so the only thing I looked for was any possibility of sweat. I did not observe any." (Aps. 195)

It will be remembered that this flour was stowed in the upper 'tween decks of Nos. 1, 2, 3 and 4 holds, and the lower 'tween decks of No. 4. Much of it was apparently in the square of the hatch. (Aps. 152)

During the course of discharge the Chief Officer

entered the compartments frequently to see if there was any damaged cargo. (Aps. 198, 209)

After discharge was completed he made a further inspection of each compartment, primarily to see if any cargo had been overlooked. (Aps. 198, 209)

It is of course common knowledge that the Chief Officer is responsible for the care of cargo. This is his customary duty, and it was Mr. Parson's duty on the "SWEEPSTAKES." (Aps. 213)

Mr. Parsons saw no water-damaged flour (211), received no report of any such damage (196), and saw no evidence of moisture or water in the holds. (Aps. 198)

Asked for his opinion whether it was possible for the flour to come into contact with salt water during the voyage, Mr. Parsons said:

I don't see how it could be possible. (Aps. 199)

(b) *Captain Lane* recalls observing the flour in No. 3 hatch. (Aps. 162) He neither knew of any damage to the flour discharged, nor received any report of any water damage whatever to any of the cargo. (Aps. 163, 164, 165, 189)

Such reports are made immediately (Aps. 163), as is the custom of ships. It was the Captain's duty to sign them and forward them to the claims and operating departments. (Aps. 164)

It was his belief that there was no possibility of

seawater having gotten into the cargo holds up to the time the ship reached Rio. (Aps. 184)

(c) *Caswell,* Brazilian claims agent for Moore-McCormack Navegaceo S. A., testified that he was aboard the "SWEEPSTAKES" from time to time during discharge of this flour, and was familiar with the shipment. (Aps. 216, 217) He testified in response to written interrogatories:

> "Employees from my department who are aboard checking tallies with manifests as discharge proceeds keep me informed. In addition, foremen, etc., have instructions to telephone me in case of serious damage coming to light; therefore, if the flour showed visible damage, my attention would normally have been called to it." (Aps. 217)
>
> "I have no knowledge of any damage to this flour either by water or other form of damage visible at the time of discharge." (Aps. 218)
>
> "Such damage would have come to my attention through the records in the customs house register and by verbal advice from stevedores and/or our own employees, as explained above." (Aps. 225)
>
> "A customs house guard and dock tally clerk are responsible, together with our own tally clerk, for noting in official register the mark and weight of torn bags and/or mark and quantity of damaged bags; the procedure in reference to the flour ex S.S. "SWEEPSTAKES" did not differ from the usual procedure covering flour dispatched for delivery to consignee's deposit." (Aps. 221)
>
> "To my knowledge no cargo carried on the S.S. "SWEEPSTAKES" on the voyage in ques-

> tion was damaged by salt water. I have no record of any other damage except normal breakage through handling." (Aps. 225)
>
> "I think it is extremely unlikely that any extensive water damage could have escaped my attention, the attention of the stevedores, tally clerks and docks and customs house personnel." (Aps. 229)

(d) One *Luiz,* checker, employed by the Rio de Janeiro Port Administration, testified to the removal of one wagon load of the flour. (Aps. 55) While his testimony is offered by appellee, there is nothing in it to indicate that the flour was in any way damaged at time of discharge.

The *written records* at the time of discharge flatly contradict consignee's claim.

(a) *Ship's records* — mate's report of damaged cargo (Aps. 163, 164, 196) and log book (Respondent's Exhibit A-1)—show neither the damage claimed nor *any* water damage. (Aps. 163, 164) Appellee demanded production of the cargo damage report (Aps. 21), but would not accede to its introduction in evidence. (Aps. 214, 215) The court rejected it. (Aps. 215)

(b) *Shore agent's records* show no water damage to any cargo carried on this voyage. (Aps. 225) The hatch tallies were demanded by appellee (Aps. 21) and produced. Appellee does not offer them in evidence, nor any tallies in its possession. The

world-wide custom of noting bad order on discharge tallies is one of which an admiralty court cannot fail to take cognizance.

(c) *Custom's records* show no damage whatever to this shipment (Aps. 80, 222), although the law requires such a record of any damage (Decree n. 355 A of 25th April, 1890, set out at page 13, supra; testimony of de Camargo, Aps. 323 et seq.; testimony of Caswell, Aps. 221). It was to consignee's definite advantage to have a record of same, to avoid unnecessary duty. (Aps. 327, 328) Appellee offers no evidence that customs ever acknowledged this shipment to have been in bad order when discharged.

(7) POSSIBLE SOURCES OF DAMAGE

At this point we approach the issue from another direction.

The trial court found that 3,087 bags of this flour were extensively damaged by seawater while aboard ship, and "That the sole proximate cause of the aforesaid damage was the negligence of the respondent, as carrier, in the *improper care* of said flour while in transit aboard the S.S. "SWEEPSTAKES" and in *negligently permitting the said flour to be contacted with salt water* while aboard the vessel. That there was no excuse for such negligence," etc. (Findings VI, VII, VIII, Aps. 27, 28, emphasis ours).

The court explains it this way:

> "There is no positive eyewitness proof that, between the time of taking the goods aboard the vessel at New York and the discharge of the goods from the vessel at Rio de Janeiro, they were actually brought in contact with sea water, but it is possible that from some cause unknown during the voyage the sea water was permitted to contact the goods either by passage in and about the deck and stowage place on the vessel while the sea water was in liquid form as water, or by coming aboard in and about the cargo stowage space in the form of ocean spray. These possibilities are inferences from the fact that the ship made a voyage from New York to Rio de Janeiro with these goods on board after they were received on board in apparent and in actual good condition, and from the fact that no other possibility for contact of sea water with the goods was indicated by the evidence." (Aps. 356)

What possibilities? We are not dealing with metaphysics. A vessel is a complicated creature, but she has certain well-known features and characteristics. An admiralty court is not justified in talking about possibilities "from some cause unknown," when there is affirmative evidence in the case dealing with these features and characteristics of the ship.

a. *Water within the ship—deep tanks.* There were none. (Aps. 139, 148)

b. *Water within the ship—pipes.* Nos. 1, 2, and 3 'tween decks are clear of pipe lines.

The Captain was not certain as to Nos. 4 upper and

lower 'tween decks. (Aps. 183, 184) The Chief Officer testified that he inspected the sanitary pipes in the holds prior to sailing. (Aps. 207) The fact that bilge soundings were small and fairly constant suggested to the Chief Officer that there was no leakage of any kind. (Aps. 196) Captain Lane testified that the average reading was three to four inches and that there were no overflows on this voyage. (Aps. 179, 180)

c. *Water within the ship—condensation.*

Sweat was the only possible source of damage, in the opinion of the Chief Officer. (Aps. 195) To obviate this the ventilator blowers were turned on as soon as the hatches were battened down. The flour was protected by dunnaging, including paper, as previously outlined (page 9, supra). No sweat or evidence of sweat damage was observed. (Aps. 195, 198, 210, 211) In any event, it could not account for the damage claimed. (Aps. 209, 210)

d. *Water outside the ship—open hatches.*

It did not rain during loading operations in New York. (Aps. 155, 156, 193) Customary precautions to protect dry cargo in rain are described by Captain Lane, including particularly hatch tents and sling covers. (Aps. 157)

The hatches were battened down after loading was completed. (Aps. 159) The holds in question

were not opened at Trinidad. (Aps. 160, 194)

There was occasional rain at Rio during the discharge, but appropriate precautions were taken as to cargo aboard, as previously outlined (see page 12, supra).

e. *Water outside the ship—hatch covers.*

The vessel was equipped with modern steel pontoon hatch covers on the weather decks. (Aps. 144, 194) It had been outfitted with new tarpaulins (Aps. 147), and these were inspected by the Chief Officer when they were put in place (Aps. 184, 194) There were three to each hatch cover, and "they were put on properly." (Aps. 194) The covers were inspected by the Board of Underwriters of New York after they were fitted. (Aps. 184)

f. *Water outside the ship—decks and sides.*

It is conceded by appellee that this was a fully welded ship—that is, there were no rivets. (Aps. 144)

There is no evidence whatever to support a speculation that the ship's deck or shell plates were cracked or had holes in them.

For one thing, the damage as described by appellee's witnesses is not consistent with a flow of concentrated water, such as would come from a leak in a plate. (Aps. 272) For another, there would be a water flow to the scuppers. (Aps. 272) This

is wholly at odds with the bilge soundings recorded in the log.

The master testified that in his opinion, based upon his sea experience, the ship was in all respects seaworthy. (Aps. 180, 181) The Chief Officer similarly testified. (Aps. 199)

No heavy weather was encountered en route. (Aps. 196, 157, 195, 184) Captain Lane:

> "Well, the ship was never loaded to capacity. All we would have is the spray, what you would normally get when bucking the trade winds from Trinidad up to Rio City." (Aps. 180)

A large proportion of these sacks, in the four upper 'tween decks, was of course above the water line. A leak in the side cannot account for the damage, and again, is not reconcilable with the bilge soundings.

g. *Water outside the ship—ventilators.*

Both intakes and exhausts for ventilation were situated on top of the king posts. There were no cowl type ventilators. (Aps. 139)

The court inquired of the witness Gow, the only expert and independent marine surveyor in the case, whether the damage might not come from salt spray.

> "A. * * * It could cover a small number of bags right under a ventilator, but there is *no chance* of its spreading out over a large area and affecting the number of bags that are represented here." (Aps. 272, emphasis ours)

At this point Gow had not been asked to assume that the "SWEEPSTAKES" had the modern ventilating system previously described, without cowl type or deck ventilators. (Aps. 272, 273)

We find no other source of possible water damage suggested in the evidence. The court's resort to speculation as to the *possibility* of "some cause unknown" (Aps. 356) was not for want of evidence on the subject, but because that evidence refuted the premise of its opinion.

(8) SUBSEQUENT HISTORY OF THE SHIPMENT

We now summarize the disposition of the flour from the time it left the ship.

As previously stated this was priority cargo. The flour was discharged commencing on February 21. Flour was completely off the ship sometime on February 23, according to the records of Caswell. (Aps. 217)

It was to be carried by rail in open flat cars directly to consignee's mill in the same city, about 1800 meters from the dock. (Aps. 57, 59, 81, 109) This is a distance of little more than one mile. The cars apparently left the dock on the same day they were loaded. (Aps. 55,56)

Consignee's employees say that the flour began to arrive on February 22, and continued to arrive up to and including March 1, 1946. (Aps. 109, 116)

They do not state when the wet flour arrived.

Ferreira, an office clerk of consignee's, made the inspection upon arrival. Asked to describe the damaged lot, he states:

i. The sacks were wet.

j. The damage varied; some bags were wet on top, others on the bottom or sides, and others completely wetted. (Aps. 109)

The wet sacks were segregated under his supervision. (Aps. 107)

A surveyor, Ramos, then 24 or 25 years old, and employed by consignee's insurance company, later inspected the damaged flour. (Aps. 66, 67) The dates were March 6 and 8. He found 3,087 bags damaged. (Aps. 68) At this time the sacks were dried and spotted. The flour had formed a hard crust. (Aps. 69) The damage was in patches of various sizes, some on the ends, some on the sides. No system could be noted. (Aps. 76)

Samples were taken by Ramos from six sacks selected at random (Aps. 69, 75) and delivered by him to the chemist Barreto. (Aps. 70) No sample was preserved. (Aps. 71)

The damaged flour was taken to consignee's mill for separation. (Aps. 104) No record is produced as to the results of segregation, or the cost thereof. This matter is taken up at page 40, infra.

Ramos formed no independent conclusion as to

the cause of the damage. (Aps. 77, 80) He took no part in the disposition of the damaged flour—has no knowledge as to this. (Aps. 81)

(9) APPELLEE'S EVIDENCE

None of the evidence so far referred to supports the court's finding that these 3087 bags of flour were wet when discharged from the "SWEEPSTAKES."

The fact that they arrived at consignee's premises wet is consistent with the fact that they were discharged dry. There is an unaccountable delay of at least six days in carrying this shipment less than 1.12 miles.

Appellee offered no evidence as to where the flour was taken, what conditions it encountered, anything to inform the court.

The statement of the court:

> "I do not find any fact or circumstance in the evidence as to what occurred from the time of discharge of the goods from the vessel until their arrival at the libelant's warehouse or mill which would give rise to or establish or tend to prove that the goods were damaged by sea water or were damaged at all while being unloaded from ship to dock and/or while being transferred from dock to libelant's mill or warehouse." (Aps. 357)

is incongruous. There were no such facts or circumstances put in evidence, other than as to unloading.

On oral argument appellant urged the court to consider this gap in appellee's proof. Our position was that the burden was upon libelant to establish its allegation that the damage occurred while the goods were aboard the "SWEEPSTAKES." The court expressed surprise at such a contention. His unannounced view that the burden was ours seems to be the only explanation for this expression in the opinion.

We turn now to the evidence offered to connect this damage with the ship.

The chemist Barreto made a report of analysis of the samples given him by Ramos. This report is dated March 11, 1946, and is Libelant's exhibit 4.

It is addressed to consignee's insurer, and the part here important reads:

> "The analysis made on two samples of wheat flour, with the designations: Moinho da Luz—Recl. 18025, gave the following result:
>
> Chlorites
> (Derivatives of chloric acid)....Presence
> Sulfates .....Traces
> Sodium .....Presence
> Calcium and Magnesium.....Traces
> Reaction .....Acid
>
> "From the result of the above analysis, it is concluded that the average came from salt water." (Aps. 90)

The chemist reported (before any controversy arose) that he analyzed *two* samples of *wheat flour* in terms of *qualitative analysis,* and concluded

from that analysis that the contaminant was salt water.

On October 21, 1948, the chemist Barreto gave his deposition upon written interrogatories before the Vice Consul at Rio de Janeiro. This was two years and seven months and more after he issued his report.

In this deposition he testifies that he

a. Identifies exhibit 4 as a *full, true* and *correct* report of the chemical analysis made by him upon the samples submitted by the insurance company. (Aps. 84)

b. Made both a silver nitrate test and a Volhard process analysis for chloride, upon *six* separate samples. (Aps. 85, 91)

c. Made both a qualitative and a *quantitative* analysis for sodium, upon *six* separate samples. (Aps. 86, 91)

d. Made a quantitative analysis of the *undamaged* flour. (Aps. 93)

e. Made a *comparative analysis* of other flour intentionally contaminated by salt water. (Aps. 87)

f. Made a separate analysis of the *sacking material.* (Aps. 87, 88)

g. Took *his own samples.* (Aps. 88, 89)

He disputes himself, however, on this point. (Aps. 92) So does Ramos. (Aps. 70)

No percentage figures were adduced in support of his recollection of his quantitative analyses. (11, Aps. 86; 16, Aps. 87; 6, 8, Aps. 93; 14, Aps. 95)

No samples were preserved. (Aps. 89)

His testimony, if believed, establishes that 6 of the 3,087 damaged bags had been in contact with salt water at some time before being sampled.

The uncontroverted evidence in the case is that 6/3087, or slightly less than 0.2%, is not a sufficient sample to stand as representative.

Dr. Punnett, a consulting chemist with the Pease Laboratories in New York, with a broad experience (Aps. 281, 282), testified upon oral interrogatories to the accepted method:

> "Samples are taken from a number of bags approximately equal to the square root of the total number of bags, with the provision that not less than ten bags be sampled." (Aps. 294)

Other details of the method are given. (Aps. 294, 295):

> "That method is accepted by the Association of Official Agricultural Chemists, and is printed in their book which is entitled 'Official and Tentative Methods of Analysis of the Association.' The same method is accepted by the American Association of Cereal Chemists and printed in their book of methods which is entitled 'Cereal Laboratory Methods,' published in 1947. The methods endorsed by these two societies are accepted almost universally by chemists who are engaged in food analysis or cereal analysis." (Aps. 295)

As to the sampling in this case, he said:

> "My opinion is that the sampling of six bags out of some 3000 would be most inadequate." (Aps. 296)

The square root of 3087 is 55.

The logical basis of sampling is explained by Dr. Punnett under cross-examination. (Aps. 321, 322) The object is to establish a high degree of probability that the samples represent the whole.

> "* * * the sampling is always considered to be a high degree of importance, perhaps of equal importance to the exact analysis, and establishes the reliability of the results obtained by the analysis." (Aps. 322)

Even the chemist Owens, called by appellee at the trial, was not asked by its counsel as to the sufficiency of six samples. (Aps. 333 et seq.)

Accepting Dr. Barreto's testimony at face value, therefore, there is still no proof that all of this flour was damaged by salt water.

Still less is there proof that such damage occurred before the flour was discharged. Barreto himself does not say so.

Some sacks may have encountered much different conditions than others during the week-long haul over that 1.12 miles between the dock and the consignee's premises.

Salty tarpaulins, rain, spray from the seaside, the wooden flat cars fresh from carrying salt hides or casks, any number of possible combinations might account for a salt reaction obtained by Barreto.

These speculations are at least consistent with the evidence.

The court's speculation, which the chemist did not make, is that the 3,087 bags were wet with seawater when discharged from the "SWEEPSTAKES."

This is the well-spring of findings and conclusions attacked by our assignments of error 1, 2, 3, 4, 11a, b, e and 12.

(10) CONCLUSION

We urge the court to hold that upon all the evidence material to this issue, appellee did not prove by a preponderance of the evidence that the sacks were wet when lifted out of the ship, and that the court's findings to this effect were error.

We further urge the court to rule that upon the same and other evidence inter-related thereto, heretofore summarized, appellant proved that the SWEEPSTAKES was in all material respects seaworthy and that its personnel exercised due diligence to protect appellee's goods while in their care.

The basis of this request is the district court's opinion (Aps. 357) and findings (VII, VIII, Aps. 27, 28) of negligence and improper care. Since no negligence was alleged (libel, Aps. 4), apparently the court concluded that the origin of the water was some peril of the sea (a cause excepted under §4 (2) (c) of the Carriage of Goods by Sea Act, 46 USC §§1300 et seq., pleaded in the answer, Aps.

7, 8), but that the ship was guilty of negligence and improper care, making her owner liable.

In any event, the findings as facts of negligence and improper care are wholly improper—they have no support whatever in the evidence.

B.

WHETHER EXPERIENCE OF THE VESSEL ON THE PRECEDING AND SUCCEEDING VOYAGES IS RELEVANT TO THE ABOVE ISSUE.

The error assigned is:

> "10. That the Court erred in rejecting respondent's evidence of condition and seaworthiness of respondent's vessel "SWEEPSTAKES" as to prior and subsequent voyages of the vessel, and north bound on the same voyage in respect of showing no sea water damage or other damage to any cargo on such voyages; that there were no leaks and no repairs were made to the vessel, all as bearing upon the issue of the possibility of sea water damage on the voyage in question.
>
> That libelant objected to said testimony as follows:
>
> 'Mr. Howard: At this point I object to that question. It is a question directed to the Master of this vessel interrogating him as to claims for damage to sugar carried on a previous voyage. I submit whether or not they had any claims for damage on a previous voyage had no bearing on the claim made by libelant in the present case. Before Your Honor rules on that I would like an opportunity to cite authorities I have on that question.' (Aps. 140).
>
> 'Mr. Howard: I object to this question and the next three questions following on the same grounds as stated this morning, that is, that

this now relates to a subsequent voyage and not the voyage in question. I submit that any evidence of cargo or damage, if any, that may have been sustained to cargo on a subsequent voyage would not be admissible for the same reason that evidence of damage on a prior voyage would not be admissible.' (Aps. 165).

"That the court sustained said objections and excluded said evidence and all subsequently offered evidence on the same issue. (Aps. 141, 143, 144, 146, 148, 177, 178).

"That respondent made due and proper offers of proof in substance as follows:

"That on the preceding voyages of this vessel to European and South American ports and return to New York and upon return to New York on the northbound voyage in question, and on the subsequent voyage to South America, there was no evidence of leakage of the hull or decks or at all, or of any water, sea water or moisture damage to cargo from any source or cause." (Aps. 142, 144, 146, 147, 178) (Aps. 38-40).

We at once acknowledge that the district court does and should have wide discretion in determining the scope of indirect evidence.

The problem before the court, however, was to determine a physical fact: did seawater get into the SWEEPSTAKES' holds?

Appellee had presented a case of indirect and circumstantial proof—Barreto's analysis being the only link to salt water, much less the ship.

Appellant called as its first witness the man best acquainted with that ship—master of the SWEEPSTAKES since 1944. (Aps. 138, 139).

Appellant sought to develop that the ship had not leaked before and did not leak after the trip from New York to Rio. It brought out that on the preceding voyage, outbound, the SWEEPSTAKES carried a full load of sugar. (Aps. 140) Our object, as stated to the court (Aps. 141), was to show

> the unlikelihood of any such damage, because we had none on the voyage in question, none on the preceding voyage, none on the subsequent voyage, no repairs were made to the ship * * * we are trying to show the whole picture.

The express question then before the court was whether there had been any claims for damage to the sugar. (Aps. 140). This is once-removed from the question whether there was damage, but the precise question is unimportant. The court expressly rejected any evidence relating to the matters above outlined by counsel.

> You will have to pass the questions and answers which relate to that point. (Aps. 141)

The following offers of proof by the master, Captain Lane, were made, and in each case appellee made the same objection (no bearing on the case), and in each case the court sustained the objection:

> ". . . I offer to prove by this witness and the questions and answers contained in the deposition that on this voyage to which the witness is testifying, being the voyage immediately preceding the voyage on which the alleged damage occurred, that the vessel discharged its cargo at Marseilles, France, in

100% condition; that there was no loss or damage on account of sweat or water damage; and that on this voyage there was no evidence of any leaking of the hull or deck plates in any respect." (Aps. 142).

"In connection with my offer, I offer to prove by this witness, in addition, that on the voyage from Naples to Rio de Janeiro, being the immediately preceding voyage, the vessel carried a full cargo of military supplies, food stuffs, a full cargo, and that there was no damage to any cargo on that voyage." (Aps. 144).

"I offer to prove by this witness that after discharging the cargo at Rio which came from Naples, the vessel then went to Buenos Aires, loaded wool and hides; went to Montevideo, loaded more wool; then to Santos and loaded coffee; then to Rio and loaded more coffee; stopped at Trinidad for fuel oil; then proceeded to the United States, North Atlantic ports including Boston and New York; and that during the course of this northbound voyage there was no evidence of leakage in the vessel, no damage to any cargo." (Aps. 146)

"The offer, Your Honor, is merely to prove by this witness that there was no damage to cargo by leakage or water on this northbound voyage and that the cargo was discharged." (Aps. 147)

"In view of the Court's ruling, the respondent offers to prove by this witness that on the northbound voyage immediately following the discharge of the flour at Rio de Janeiro the ship called at Buenos Aires and Montevideo and loaded cargo consisting of hides and wool and casein, and coffee at Santos and Rio, and that this cargo was carried to New York where it was discharged, and that there was no damage to any cargo by reason of water or salt

water on this immediately following northbound voyage of the vessel." (Aps. 178).

It seems self-evident that if enough sea water could get into a ship to seriously damage 3,087 large bags of flour, there is something wrong with it. Any evidence touching her condition or seaworthiness so far as leaks are concerned is directly in point.

The court wanted to know her condition at time of loading. (Aps. 146) It did not perceive that the evidence of such condition is cumulative, and largely circumstantial. Cargo vessels are in business. They arrive, berth, discharge, load and depart for the next port as quickly as possible, to stay in business. Only on the occasion of dry-docking and annual inspection and classification can it be said with any reasonable assurance: all welds are sound, all pipe fittings are tight, etc.

It is of course conceivable that some unique disaster occurred, or that some serious leak was sprung, patched and concealed by the ship. But such things are improbable. Moreover, they would leave a train of evidence not beyond the ken of those interested.

The *probability,* assuming that the water did leak in in such great quantity, the probability is a continuous weakness of some kind.

We submit that the most credible proof whether there was such a weakness is the condition of other

susceptible cargo, before, during and after the voyage from New York to Rio. Flour gets off with relatively light damage from salt water. (Aps. 265) Sugar (Aps. 142), wool, hides, coffee (Aps. 146), and casein (Aps. 178) would scarcely fare better than did appellee's flour.

In *Castile v. Bullard,* 64 US 172, 188, the Supreme Court stated:

> "Whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry or the failure of direct proof, objections to testimony on the grounds of irrelevancy are not favored, for the reason that the force and effect of circumstantial facts usually and almost necessarily depend upon their connection with each other. Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof. Applying these principles to the several exceptions under consideration, it is clear that no one of them can be sustained."

We respectfully submit that the necessities of the case called for circumstantial evidence as to the possibility of a leak; that no one circumstance which appellant might prove was conclusive upon this issue; that these circumstances offered to the court, together with the other circumstances shown, were "by their number and join operation, especially when corroborated by moral coincidences, sufficient to constitute conclusive proof."

In the premises the court's refusal to hear and consider them was prejudicial to appellant and unwarranted in law.

C.

NOTICE OF SURVEY

The assignment is:

> "9. That the Court erred in finding that libelant gave respondent sufficient notice of damage or claim and in finding that respondent was afforded sufficient or any opportunity to survey, test, sample or analyze the alleged damaged flour. (Finding of Fact 10.)" (Aps. 38).

The finding in question (Aps. 29) follows from this holding:

> "The Court believes that by the communication dated the 2nd of March, following the commencement of discharge of the cargo at Rio de Janeiro on February 21st, the respondent had as good an opportunity to make an analysis of the damage as did the libelant. . . ." (Aps. 356).

The letter in question, from consignee to Moore-McCormack, S. A., is in substance as follows:

> 'Gentlemen: Ref.: 10,500 sacks with 252,000 kilos of flour shipped in New York on the steamship "SWEEPSTAKES," corresponding to bills of lading dated 1/31/46. Having noted a certain number of torn sacks with loss of contents, and as many more wet, on the unloading of the flour under reference, we are advising you that we hold the steamer's owners responsible, as transporters, for the averages above mentioned.' (Aps. 64).

It will be seen at once that this letter does not

advise of the immense damage claimed in suit (29% of the whole shipment) nor give any intimation of a claim of seawater contamination. Nor does it advise that the flour was still on hand (it had been delivered eight days or so before receipt of the letter). Nor does it suggest survey.

This Court, having in mind the knowledge of the witness Caswell as of March 2, to-wit, his personal observation and familiarity with damage on outturn, can readily appreciate the basis for his reply to the above letter, in substance as follows:

> 'Ref: SS SWEEPSTAKES, V 12S 10,500 Sacks of flour. Gentlemen: In reply to your favor of the 2nd inst., we must inform you that according to the registers of defects and averages of the Wharf Warehouse, the packages above were unloaded in perfect condition, the which exempts us from any responsibility.' (Aps. 65).

It seems to us that in the circumstances—the intervening railcar carriage, the clean discharge and customs records, and the fact that Caswell was not apprised of the size of the claim—the appellee was under duty to notify of the findings of Ramos and Barreto, and afford an opportunity of verification.

While *Evansville-Marblehead* (EDNY), 1941 AMC 62, is a collision case, the remarks of the Commissioner are appropriate here.

"* * * if the wrongdoer must make the libelant

> whole again, he should have, at the very least, an equal opportunity to survey, estimate and appraise the damage for which he is asked to pay." (64)
> "I am constrained to dwell on this matter because this case is a concrete example of the trouble, delay and expense such a course may entail for all the parties." (65)

The penalty against claimant is that its surveyor's (and in this case, its chemist's) testimony is most carefully scrutinized and judged accordingly. Report of Commissioner, *Ansaldo San Giorgio I* (SDNY), 1933 AMC 402, 407. The "strictest proof of the character and extent of the damage is required." *Glenbogie* (N. D. Ohio), 1937 AMC 1194, Commissioner's report, 1202.

The essence of the district court's finding is that it holds appellant as though it had attended. *Caledonier* (SDNY), 60 F. (2d) 562, 1932 AMC 954, 955.

The error assigned bears both upon the weight to be attached to Barreto's testimony about his analysis, and upon the weight to be given Ramos' estimate of damage.

We urge the Court to overrule the finding that the notice of claim was in effect an invitation of survey, as not justified by the evidence.

D.
EXTENT OF DAMAGE

The errors assigned are:

"5. That the Court erred in finding that there

was a competent or sufficient survey, testing, sampling or analysis of damage to said flour on the basis of chemical analysis, testing or sampling to establish a loss or damage of 35% of the sound market value of the contents of each bag, or in finding that there was any competent or sufficient evidence of any other percentage, measure or extent of loss or damage whatsoever. (Findings of Fact 8 and 9.)" (Aps. 37, 38)

"6. That the Court erred in finding that there was no salvage obtained or obtainable from the damaged flour. (Finding of Fact 8.)" (Aps. 38)

"8. That the Court erred in finding that the difference between the sound market value and the value of the alleged damaged flour was $6,774.42 or any sum whatsoever. (Finding of Fact 9.)" (Aps. 38)

"11. That the Court erred in making and entering Conclusions of Law 1 and 2 in that there was no proof or sufficient proof—

(c) That the damage was 35% or any other percentage or measure of damage;

(d) That the sound value of the flour, less damaged value was $6,774.42 or any other ascertainable sum;

(e) That the evidence was insufficient to establish respondent's liability at all and was insufficient to establish any basis of damage as to the extent thereof or the value thereof." (Aps. 40).

The only probative evidence offered by appellee as to damages was the testimony of Ramos, summarized at page 25, supra. In answer to written interrogatories Ramos stated that he was employed by the consignee's insurer (Aps. 66, 67) as a surveyor. The deposition was taken on November 19,

1948, at which date Ramos was 27 years old (Aps. 66). He was therefore 24 or 25 years old at the time of survey. (Aps. 68) He had no technical training (Aps. 67), and did not testify as to any previous experience in handling damaged flour.

He did verify the count of damaged sacks, and select six sacks at random for inspection. (Aps. 69). He concluded that the damage was from water. (Aps. 71).

He opened the six sacks. "In each sack it was estimated that nine kilos of flour were damaged. The percentage was therefore calculated at thirty-five per cent. It could be seen that the other unopened bags were in the same condition." (Aps. 72).

Nine kilos is approximately twenty pounds. It is 18% of the weight of the sack.

On cross-interrogatories Ramos testified that: "The damage was in patches of various sizes, some located on the ends, some on the sides. No system could be noted." (Aps. 76).

He admitted that no actual segregation was made in computing the percentage of damage in the six bags. (79) "The damage was estimated, taking into account the apparent depth of penetration and also the additional labor which would be required to salvage the good flour, and replacement of the bags." (Aps. 79)

Ramos had nothing to do with the subsequent

disposition of the flour. (81) As appears from other testimony, it was in fact sent to the appellee's mill and reconditioned. (Aps. 104, 112, 119). Ferreira testified he believed the consignee had records of the flour recovered in reconditioning (Aps. 104), but the accountant Herold denied it (Aps. 120).

The evidence of appellant on this point was given in open court. Gow, an experienced marine surveyor, testified at length as to his experience in handling water damaged flour. (Aps. 258 et seq.)

His testimony was in substance that to fairly estimate damage, sacks would have to be segregated according to degree of damage (Aps. 262, 263), that if damage was varying a minimum of 10% of the bags would have to be examined (Aps. 263).

He further stated that in his opinion no one could determine the extent of damage to a sack of flour without segregating and weighing the good flour. (Aps. 267)

In his experience with *totally submerged* flour sacks recovery was made of 95% of the contents (case of Djambi, Aps. 264, 265, 275, 277), the reconditioned flour being perfect.

The gluten seal explains this phenomenon. (Aps. 267)

We submit that the evidence of Ramos, standing alone, is insufficient to establish appellee's damages in any amount. His sampling fell so far short of representation or fairness that it can scarcely be

convincing. His guess at the weight of damaged flour appears unreasonable, and measured by the results obtained in *Djambi* is absurd.

Courts have previously taken notice of the importance of sampling.

West Faralon (N.D. Cal).), 55 F. (2d) 725, 727, 1932 AMC 302, 305:

> "Libellant's witness, Mr. Eckford, testified with reference to the examination before shipment of the two lots for which damage is asked. In making his inspection and survey, he opened 14 bags out of the 1,500 bag lot, and 25 bags out of the 4000 bag lot, one sample taken from each bag being 'about two grab-handfuls.' He made tests for count and weight, but no boiling test, and apparently his examination of the sample was purely visual of the exterior of the nut.
>
> "Respondent's witness Wilson testified that opening 14 bags out of 1500, and 25 out of 4000, was not a fair test of either shipment; that opening 5% of the shipment was the customary sampling in the Orient, and 10% in San Francisco; that this custom of the trade would have required Mr. Eckford to open 75 bags out of the 1500 bag lot (instead of 14), and 200 bags out of the 4000 bag lot (instead of 25), if he followed the Oriental custom, and 150 and 400 bags if he followed the custom of the San Francisco trade for which the peanuts were intended; that the 'grab-handful' method of getting the sample was improper; that the proper method is to open the bag, dump the contents, inspect the entire contents, and then get the sample from the contents as a whole.
>
> "Mr. Wilson's testimony in this regard was corroborated by other witnesses. It is doubtful if the test made by Mr. Eckford was fair."

Contrary to the practice of public surveyors, Ramos made no effort to follow through and determine the actual results of reconditioning and sale. Since appellee itself made the separation, without retaining a record of the result, it should scarcely be in a position to benefit by that conduct.

The proper legal consequence is indicated in the syllabus to *Meyer & Brown v. Cunard Steamship Co.* (SDNY), 1924 AMC 873 (not reported in full):

> "Where there is no evidence of sale of goods as damaged, nor of reconditioning, but only a surveyor's estimate of what would have to be done, libellant must bring further proof of injury to the goods and/or cost of reconditioning."

Compare *Caledonier* (SDNY), 60 F. (2d) 562, 563, 1932 AMC 954, where although damages were founded on estimate, the examination was "thorough," and the surveyor "skilled in his work."

We urge the Court to reject the findings of the lower court as to extent of damage, as based upon speculation and guess, and particularly because the true result of reconditioning, the real evidence of damage, was or should have been in appellee's hands, and was not produced.

We submit further that the opinion evidence given by Gow is the only credible evidence of the possible extent of damages, and that damages in any event should be fixed at not over 10%, where there is no

showing of taint or other than physical loss. (Aps. 264, 266).

E.

EVIDENCE OF MARKET VALUE

The assignments are:

> "7. That the Court erred in finding that the sound market value of flour at the port of Rio de Janeiro at the time of delivery to libelant was 137 Cruzerios or 126 Cruzerios, or in finding that there was any competent or sufficient evidence of sound market value of said flour. (Finding of Fact 9.)" (Aps 38)
> "8. That the Court erred in finding that the difference between the sound market value and the value of the alleged damaged flour was $6,774.42 or any sum whatsover. (Finding of Fact 9.)" (Aps. 38)

It has already been pointed out (under *D,* supra) that appellee's evidence as to the quantum of physical damage and cost of reconditioning was speculative at best. If the opinion of Gow is considered, it is worse than speculative—it is grossly at odds with experience in flour reconditioning.

Damages were calculated by multiplying the speculative estimate by a market-value figure. (Opinion, Aps. 357; Finding IX, Aps. 28).

In this sub-section we challenge the sufficiency and competency of appellee's evidence as to market value.

In appellee's answers to interrogatories, filed in March, 1948 (Aps. 19), more than a year after suit

was commenced (Aps. 6), appellee stated:

> "Interrogatory No. 17. Sound market value at Rio de Janeiro, duty paid, of each bag of American wheat flour weighing 50 kg. as of date of discharge was Cruzeiros 126.00, which at the then prevailing rate of currency exchange would be $6.62 U. S. funds per bag." (Aps. 17)

We presume that there was some basis in fact for such a statement.

The only evidence in the case is the testimony upon written interrogatories of one Herold, an accountant employed by appellee. (Aps. 115, 116)

Late in 1949, and shortly before trial (Aps. 128), Herold was called upon to testify as to his personal knowledge of the disposition and sale of this flour, and its cost and market value. He was advised of the interrogatories well in advance. (Aps. 122, 123) He took data from appellee's records and made notes for purposes of giving testimony. (Aps. 116, 118, 123).

He had no personal knowledge as to the condition or disposition of the damaged goods. (Aps. 116-120).

He testified in detail as to the elements of delivered cost, arriving at a figure of Cr. $98.2594 per sack. (Aps. 122)

Testifying to market value, Herold stated:

> "According to our records the selling price was 137 cruzeiros per sack of fifty kilos." (Aps. 121)

Appellant objected to admission of this evidence on the basis of matters contained in the cross-interrogatories. The court reserved ruling. (Aps. 121)

The pertinent cross-interrogatories and answers are these:

> "Cross-Interrogatory No. 4: If you have refreshed your memory from records, please state what these records are and when made and where they have been kept since you made them.
>
> Fourth—To the Fourth Cross Interrogatory he says:
>
> The date of entry I have taken from daily statements received from the mill; the cost of the flour I have taken from our accounting records. These records are kept at our office at Rua Rosario, No. 160, and they were made on the occasion, in February or possibly March, 1946. (Aps. 123).
>
> "Cross-Interrogatory No. 23: Are there records or published prices of fifty kilo bags of Aida Brand wheat flour applicable to the months of February or March, 1946, at Rio de Janeiro, as sold by the mills or companies such as Companhia Luz Stearica?
>
> Twenty-Third—To the Twenty-Third Cross-Interrogatory. He says:
>
> I don't think there are published prices. Prices of flour in recent years have been fixed by the Central Price Commission both for manufactured and imported flour. We sell our flour at those prices. (Aps. 126).
>
> "Cross-Interrogatory No. 24: State what that price was and furnish a copy of the record or published price list of such flour.
>
> Twenty-Fourth—To the Twenty-Fourth Cross Interrogatory. He says:
>
> I cannot furnish a record, but as I have

stated, I believe the prices to have been 137 cruzeiros per bag of fifty kilos of this brand or type." (Aps. 126).

Our objection to receiving Herold's testimony of price, and the wholly unwarranted effort of the trial court to secure our consent to be bound by that testimony, is set out verbatim for the Court's convenience:

"Mr. Wakefield: If the Court please, that is the answer that I wish to move to strike, the answer to Cross-Interrogatory No. 24, and also the answer to direct Interrogatory No. 21, for the reason that the answer to Cross-Interrogatory No. 23 shows that the price of imported wheat flour at Rio de Janeiro was governed by a Government agency, to-wit, the Central Price Commission, at this time and was fixed. That is similar, I take it, to our OPA.

"In his answer to Cross-Interrogatory No. 24 he says he believes the price was 137 cruzeiros per fifty kilo bag, and that relates back to his answer to direct Interrogatory No. 21, where he says without qualification that it was that much per bag, for this reason: In the first place, if the price is a matter of public record, fixed by the Central Price Commission, that is definitely the best evidence. Here where we are thousands of miles away and must rely on these depositions, I take it that we are entitled to be at least reasonably technical about these matters, because my cross-interrogatory asks for a copy of the record or published price list, and the witness has failed to furnish that.

"His answer is, 'I believe' it was so and so. He is testifying almost four years after this date of March, 1946, and to permit to stand in a deposition as testimony the fact that he believes it was so and so, when it is shown by his

own testimony that it is a fixed price by a Government agency, and where I asked for a copy of it, I think is entirely improper, incompetent and prejudicial to the respondent's case. We can't cross-examine his recollection, and where it is shown by his own statement that there is a record of it, to-wit, the Central Price Commission having fixed it, I take it that should be stricken, that he believes it was 137 cruzeiros.

"The Court: Has the libelant adopted any other means or method of proof on this issue?

"Mr. Howard: This is the only sworn testimony on that, Your Honor. I will say this, that at an earlier stage in this proceeding, when certain interrogatories were propounded to us by Mr. Wakefield for answer on behalf of libelant, I answered at that time that the corresponding figure would be 126 cruzeiros.

"The Court: The statement here is 137.

"Mr. Howard: 137, yes, Your Honor. In answer to interrogatories, I had made the statement that, 'Sound market value at Rio de Janeiro, duty paid, of each bag of American wheat flour weighing 50 kg. as of date of discharge was Cruzeiros 126.00.' I did not make that statement at that time on the basis of this witness' testimony; I made it on the basis of reports we secured from our correspondents at New York who advised us that was the sound market value.

"The Court: And this is at variance with that statement?

"Mr. Howard: To the extent of 11 cruzeiros. I am willing, if counsel objects to this, to limit my proof on damages to the statement I previously made on answers to interrogatories, namely, 126 cruzeiros. Neither one of us knew of this answer until this deposition was received, as of Monday, a week ago today.

"The Court: Have you any objection to the

proposal made by Mr. Howard? Do you object to his doing so in view of the surprise answer, surprise not only to you but to Mr. Howard? Mr. Howard should be entitled to have some proof of the allegation, and if he in good faith relied upon this as being some evidence of the allegation before opening this deposition, you can plainly see the disadvantage, can you not?

"Mr. Wakefield: Definitely.

"The Court: Otherwise, he might say, 'I ask a continuance of the trial for the purpose of getting other testimony on this matter of selling price.' I do not know that his request to that effect would be granted, but you can see what position he might be put in.

"Mr. Wakefield: I realize that. That is why we had the continuance before, so he could get this testimony, but it is his burden of proof to prove market value or landed value or invoice value.

"The Court: Have you any information which makes you believe that it would be injurious to the best interests of your client to make admission that the price was as stated in his client's answer to your interrogatory?

"Mr. Wakefield: The only thing I can answer to that, our Honor, is that I don't know. I haven't any idea what the price is.

"The Court: For the purpose of the case, what is your attitude?

"Mr. Wakefield: My attitude is that it is his burden of proof, and he had a continuance from Your Honor once; now he is back here without adequate proof the second time." (Aps. 126-129)

The continuance referred to was secured by appellee on the morning first set for trial, because it then had no proof of market value.

The Court ruled as follows:

"The Court: I think that the witness in cross-examination has justified the Court's permitting the answer to stand. I think he has made a technical qualification for the application of secondary evidence in lieu of the best. He stated on direct examination the record information, and then on cross-examination by written interrogatories, just the same form as the direct examination was in, that while he did not have the records with him, he believed what he now says and in effect what he previously said in his direct examination. I believe that that raises to admissibility the secondary evidence, namely, his recollection of what the record showed, and that I believe is a technical qualification for the answer.

"However, I believe also that the circumstances of this being a deposition taken upon written interrogatories in a foreign country, and it being in an admiralty case, that the strictest rigidity of the best evidence rule should not here be applied. After all, this deposition is taken upon written interrogatories; it is not taken on oral. If counsel on either side desire to cross-examine this witness' qualifications for stating the secondary evidence, they had a right to take his deposition by oral interrogatories instead of written, if they wished to do so. Both sides elected to take the deposition upon written interrogatories, and I do not believe there should be applied to this situation the same rigid requirement as to secondary evidence which we might feel that it was appropriate to apply if the witness was on the stand being cross examined, or if he had been then and there upon the stand subject to oral examination.

"The objection is overruled." (Aps. 133, 134)

1. EITHER THERE WAS A RECORD OR THERE WAS NONE.

If there was none, as indicated by Herold's statement: "I cannot furnish a record" (Aps. 126), then the best evidence rule is not involved. But the trial court believed he stated "The record information." (Aps. 133) This is apparently based on Herold's testimony first quoted, to the effect that "according to our records" the price was Cr. $137. The ruling is therefore premised on Herold's information from the records.

2. IF THERE WAS A RECORD, THE LAW REQUIRED ITS PRODUCTION.

Herold knew of the interrogatories well in advance of giving testimony, as previously shown. He is an employee of appellee. Our only effective means of cross-examination was to ask him to produce the record from which he testified. (Aps. 126) He says: "I cannot furnish a record."

The best evidence rule upon this point is summarized in 20 Am. Jur. 907, Evidence, §1620, as follows:

> "Oral evidence of the contents of books of account is not competent unless a proper foundation is first laid therefor. The mere conclusions of witnesses as to the substance and effect of entries in books are not admissible in evidence where neither the original entries nor copies of them are produced. . ."

Expressly, as to testimony contained in depositions, the rule is stated:

> "§ 417. Depositions . . . . Even though the foundation for using a deposition as evidence is established by reason of the unavailability of the deponent as a witness, so far as the deposition is a statement of the contents of a letter or other writing, it is secondary evidence and is inadmissible as proof of the contents of such writing unless it is established that the writing itself cannot be produced." (Id., § 417)

The witness, an experienced accountant, offered no explanation as to whether the record from which he testified was lost, destroyed or what. In other words he laid no foundation whatever for secondary evidence.

The lower court makes the inexplicable remark that if we wished to cross-examine Herold's qualifications for stating secondary evidence, we should have employed counsel in Rio! We asked for the *record,* not for secondary evidence.

3. DAMAGES BASED ON AMOUNT STATED IN ANSWER TO INTERROGATORIES IS ARBITRARY.

Respondent did not offer libelant's answer to its Interrogatory 17 as evidence.

Answers made to interrogatories of respondent are not evidence for libelant. *Baker, Carver and Morrell Co. v. Mathiasen Co.* (CA, 2), 140 F. (2d) 522, 1944 AMC 181, 185; *Hugo v. Hedger S. S. Corp.,* (CA, 2), 142 F. (2d) 349, 1944 AMC 610, 613.

While appellee may be bound by its admission of Cr. $126 per sack (par. XII, Aps. 17, 18; Aps. 128), no competent evidence of market value is in the record, and it may not hoist itself by its own answers to interrogatories. *Baker, Carver & Morrell Co. v. Mathiasen Co.* (CA, 2) 140 F. (2d) 524, just cited.

The only theory for the challenged findings is that Cr. $137 was proved.

4. OTHER EVIDENCE OF VALUE.

The only competent evidence of value is delivered cost, Cr. $98.2594 (Aps. 122), which we conceded in trial as properly proven (Aps. 132).

We submit that the challenged findings are improper under the evidence, and that this Court should so find.

V.

CONCLUSION

We respectfully submit that the decree of the district court brought here for review is founded in disregard of the obvious truth and common-sense of the matter.

Upon the basic issue it postulates (giving appellee the benefit of any doubts) as follows:

1. The damaged sacks of flour were wet when examined at appellee's premises.

Six of these (not two, as first reported) were wet with salt water.

Therefore, it is possible that all the damaged sacks were wet with seawater.

2. The same flour was brought to Rio by sea.

It is possible for cargo to get wet from seawater while in an ocean vessel.

Therefore, it is possible that the damaged flour got wet from seawater while in the ship.

The facts which *must be* disregarded if this reasoning is to achieve the dignity of proof are:

1. It took an immense quantity of water to saturate 55,566 pounds of flour.

The dunnage and dunnage paper was dry when the flour was discharged.

The bilges were not flooded at any time during the voyage.

No other cargo (including flour to other consignees in the same holds) was damaged by water.

2. There was nothing in the voyage or condition of the ship to account for leakage of a large quantity of seawater into the holds, and it was the opinion of those in charge of the vessel and her cargo that such an incident was impossible.

3. Customs men and tallymen are required by law to note apparent damage on discharge, and it is to the benefit of both the customs men and consignees to have such notations made. Customs records show no damage.

The United States Supreme Court has clearly condemned such reasoning as was indulged in by the trial court, in *Pennsylvania R. Co. v. Chamberlin,* 288 U.S. 333, 341, 342, 77 L. ed. 819, 823, 824, 53 S.Ct. 391.

"And the desired inference is precluded for the further reason that respondent's right of recovery depends upon the existence of a particular fact which must be inferred from proven facts, and this is not permissible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist. This conclusion results from a consideration of many decisions, of which the following are examples: (citing numerous cases). A rebuttable inference of fact, as said by the court in the *Wabash R. Co.* Case, 'must necessarily yield to credible evidence of the actual occurrence.' And, as stated by the court in *George v. Missouri P. R. Co.,* 213 Mo. App. 668, 251 S.W. 729, supra, 'It is well settled that where plaintiff's case is based upon an inference or inferences, that the case must fail upon proof of undisputed facts inconsistent with such inferences'."

We further suggest to the court that exclusion of relevant experience of the vessel upon the voyages immediately before and after the one in question was error, in the circumstances of the case.

We urge again that the finding that Appellant had notice of survey is unsupportable, and that this bears upon the credence to be given to the estimates and analysis which are Appellee's only evidence.

We suggest that the findings as to quantum of damage are speculative and disproven by the evidence of actual experience.

Lastly, we submit, the finding of market value

is arbitrary and based upon incompetent testimony under the best evidence rule.

We ask the Court to reverse the decree of the lower court.

Respectfully submitted,

J. CHARLES DENNIS,
United States Attorney.

BOGLE, BOGLE & GATES,
CLAUDE E. WAKEFIELD,
M. BAYARD CRUTCHER
(Of Counsel)
Proctors for Appellant.

603 Central Building,
Seattle 4, Washington.